Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service	)	MM Docket No. 87-268
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To: The Commission

REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE

The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS")(collectively "APTS/PBS") hereby submit their Reply Comments to the Oppositions filed by Viacom Inc. ("Viacom")[1] and the Media Access Project, et. al ("MAP")[2] and the Comments filed by Motorola, Inc. ("Motorola")[3] in response to the Petitions for Reconsideration of the Commission's *Fifth Report and Order* and *Sixth Report and Order* in the above-captioned proceeding. APTS/PBS support Viacom's suggestion that the Commission establish an early filing window during which licensees allotted lower powered UHF DTV channels can seek improved facilities. They oppose MAP's argument that Section 399B of the Act, *47 U.S.C. § 399b*, precludes public television licensees from

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1 *Opposition to Petitions for Reconsideration of the Fifth Report and Order and of the Sixth Report and Order* filed by Viacom Inc. (July 18, 1997)(*"Viacom Opposition"*).

2 *Opposition to Petitions for Reconsideration* filed by Media Access Project, the Center for Media Education, Consumer Federation of America, Minority Media and Telecommunications Counsel, and the National Federation of Community Broadcasters (July 18, 1997)(*"MAP Opposition"*).

3 *Comments of Motorola* (filed July 18, 1997) (*"Motorola Comments"*).

including advertiser-supported services among the ancillary or supplementary uses of their DTV channels. While APTS/PBS appreciate Motorola's support of their proposals to give public television licensees flexibility in constructing DTV facilities, they disagree with Motorola's suggestion that allowing public television licensees to relinquish DTV assignments on Channels 60 to 69 may facilitate reallocation of those channels for nonbroadcast use. Those channels should remain allocated to broadcast use, as advocated by the Broadcasters Caucus.

I. The Commission Should Establish A Filing Window To Allow Stations Allotted Limited UHF DTV Facilities to Improve Their Facilities

In its Opposition, Viacom proposes that the Commission promptly open a filing window to allow licensees of UHF NTSC stations allotted UHF DTV channels ("U-to-U") with limited power to request improved facilities. Under this proposal, these U-to-U licensees could request limited power increases provided they would not cause additional interference to existing NTSC station or the coverage areas of DTV allotments. However, these licensees would be permitted to use "accepted engineering remedies," such as directional antennas, to avoid interference. Viacom maintains that this proposal will enhance the viability of the U-to-U DTV stations by reducing the power disparities between VHF licensees assigned UHF DTV channels ("V-to-U") and U-to-U stations. *Viacom Opposition* at pp. 8-10.[4]

APTS/PBS support Viacom's suggestion that the Commission create a special window during which only U-to-U licensees assigned DTV channels with lower power levels can

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4 Under Viacom's proposal, these U-to-U licensees would also be eligible to apply to fully maximize their facilities when maximization is offered to all licensees. *Id.* at p.9.

request higher power levels and to permit the use of directional antennas. Most public television licensees currently operate on UHF channels and many have been assigned UHF DTV allotments with limited power. Thus, APTS/PBS share the concerns expressed by Viacom and others[5] that the higher power allotted to the V-to-U stations may adversely affect the ability of the lowered powered UHF DTV stations to serve their communities. Opening a window early in the transition, during which only lower powered UHF licensees could seek improved facilities, would ameliorate some of these concerns.[6]

At the same time, APTS/PBS are concerned about the potential for increased interference to existing NTSC stations and DTV allotments if the Commission adopts any of the various proposals to relax the interference criteria. As APTS/PBS noted in their Opposition to Petitions for Reconsideration, the Commission and the industry have only limited experience with DTV operation, the impact of DTV signals on NTSC reception, and the ability of receivers to discriminate between NTSC and DTV signals and among DTV signals.[7]

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5 *See, e.g., Consolidated Oppositions to and Comments on Petitions for Reconsideration* filed by Sinclair Broadcast Group, Inc. (July 18, 1997); *Opposition to Petition for Reconsideration and Clarification* filed by The Association of Local Television Stations, Inc. (July 18, 1997).

6 APTS/PBS urge the Commission not to require licensees seeking improved facilities to file formal applications for construction permits during the U-to-U filing window. Given the planning required to construct a DTV station, many public television licensees will not be in a position to file an application if the window opens promptly. Instead, the Commission should allow licensees seeking to improve their facilities to submit a letter-request or other notification specifying the improved facilities they request accompanied by engineering showing that their proposal will not cause any new interference. That filing will give the Commission and interested parties an adequate opportunity to evaluate the proposal.

7 *See Opposition to the Petitions for Reconsideration in the Fifth Report and Order and Sixth Report and Order of the Association of America's Public Television Stations and the Public Broadcasting Service* at pp. 2-4 (July 18, 1997)(*"APTS/PBS Opposition"*).

Consequently, APTS/PBS urge the Commission to collect adequate field test data before considering whether to relax the current interference criteria. Since that data will not be available when the limited window is opened, the Commission should require that U-to-U licensees seeking to improve their facilities during that window demonstrate that their proposals will not cause any additional interference using the interference standards employed in adopting the DTV Table.[8]

II. Section 399B Does Not Preclude Public Television Licensees From Including Advertiser-Supported Services Among the Ancillary Or Supplemental Uses Of Their DTV Channels

In its Opposition, MAP supported APTS/PBS' request that the Commission clarify its rules to permit public television licensees to use their ancillary and supplementary services as a revenue source, but argued that Section 399B precluded public television licensees from carrying material that was "advertiser-supported." *MAP Opposition* at 8-9. MAP's argument is without merit and must be rejected.

A. Section 399B Does Not Prohibit Public Broadcasters From Carrying Advertisements In Ancillary or Supplementary Services

Section 399B was enacted in 1981 as part of a major revision of the Public Broadcasting Act. That revision was designed, *inter alia*, to reduce public broadcasting's dependence on annual federal appropriations. Congress recognized, however, that with reduced federal support, public broadcasters needed additional means of generating revenue from the private

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8 As APTS/PBS noted in their Opposition, once the Commission gains real world experience and collects data concerning the potential for DTV to NTSC and DTV to DTV interference, as well as receiver performance, it can review the current interference criteria and decide whether the criteria can be relaxed without adversely affecting television service. The Commission's plan to revisit its transition rules periodically affords it an excellent opportunity to collect the data it needs to make an informed judgment in this area. *Id.* at p.4.

sector, and thus gave them greater flexibility than they enjoyed previously to use their broadcast facilities for revenue generation.[9] At the same time, Congress wanted to ensure that public broadcasting's primary broadcast service remained noncommercial. The balance it struck in Section 399B was to authorize public broadcasters to offer services and facilities in exchange for remuneration, provided the licensee's public broadcast service remained noncommercial.[10] Thus, Section 399B precluded public television stations from carrying advertisements on their single broadcast channel. However, the prohibition did not apply to ancillary or supplementary services, since such a restriction would materially undermine the ability of public television stations to take advantage of the fundraising opportunities Congress authorized.

Since the enactment of Section 399B, the Commission has consistently interpreted Section 399B in this manner, and has allowed public broadcasters to provide ancillary services without regard to whether they included advertisements. For example, when it authorized television stations to provide teletext services, the Commission held that:

> we are authorizing public television stations to engage in teletext services and to offer such services on a profit-making basis. Public stations are permitted the same discretion with respect to services . . . as commercial stations. . . .
>
> We believe that authorization of profit-oriented teletext service by public broadcasters is consistent with the applicable statutory requirements and authorizations. The Act's only pertinent restriction is that any offering of services for remuneration "shall not interfere with the provision of public telecommunications services . . . ." [citing to Section 399B] After studying the 1981 Amendments and the accompanying legislative history, the Commis-

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9 *See* H.R. Rep. No. 97-82, at 13-14 (1981).

10 *See* Remarks of Representative Wirth, Chairman of the House Communications Subcommittee, 127 Cong. Rec. 13,140 (1981). *See also* H.R. Rep. No. 97-82, at 8 (1981).

> sion is of the opinion that remunerative teletext activities would not constitute such interference. There is nothing in the Act to indicate that Congress intended to prohibit public broadcasters from offering such enhanced services.[11]

By giving public television licensees the same discretion as commercial broadcasters, the Commission authorized them to carry advertisements in their teletext transmissions. Indeed, the teletext offerings under consideration by the Commission in the decision included advertiser-supported activities.[12] The Commission reached a similar result when it authorized the commercial use of the VBI and SAP.[13]

Similarly, Section 399B does not preclude a public television licensee from including advertiser-supported programs as an ancillary or supplementary service offered over its DTV channel should it choose this as a revenue generating mechanism. As long as a public television licensee offers one noncommercial broadcast service, as required by Section 73.624(c) of the Commission's DTV rules, Section 399B is satisfied. Public television licensees may use the additional capacity made possible by DTV technology as a revenue source to the fullest extent possible.

B. Section 336 Gives the Commission the Discretion to Permit Advertisements

Even if Section 399B's restrictions might otherwise apply to ancillary or supplementary uses, Section 336(a)(2) gives the Commission the discretion to allow public television licensees to include advertiser-supported services among those uses. That Section requires

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11 *Transmission of Teletext by TV Stations*, 53 R.R.2d 1309, 1322 (¶50-52)(1983)(footnote omitted, emphasis added).

12 *Id.* at 1321 (¶45).

13 *Data Transmission Services on the Vertical Blanking Interval by Television Stations*, 101 F.C.C. 2d 973, 981 (1985).

the Commission to adopt regulations "that allow the holders of [DTV] licenses to offer such ancillary or supplementary services . . . as may be consistent with the public interest," *47 U.S.C. § 336(a)(2)*. As APTS/PBS demonstrated in their earlier filings in this proceeding,[14] the public interest is manifestly served by allowing public television licensees to use ancillary and supplementary services to generate revenue -- revenue vitally needed to assist in funding the transition to DTV, to operate dual facilities during the transition, and to continue providing noncommercial educational services to the public.

While MAP contends that interpreting Section 336 in this manner implicitly repeals Section 399B, no "implicit" repeal of Section 399B is involved. Section 399B continues to apply to the primary noncommercial broadcast service offered by the public television licensee, while ancillary or supplementary uses of DTV channels continue to be free from the restrictions of Section 399B. Interpreting Sections 336 and 399B in this fashion conforms with the requirement that, if two statutes can be read consistently, they should be.[15] MAP's claim would ignore this well settled rule and would create an inconsistency where one does not exist.[16]

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14 *Petition for Reconsideration and Clarification of Association of America's Public Television Stations and the Public Broadcasting Service* at pp. 26-28.

15 *See Ionosphere Clubs, Inc.* v. *Air Line Pilots Ass'n Int'l*, 922 F.2d 984, 991 (2d Cir. 1990), *cert. denied*, 502 U.S. 808, 112 S. Ct. 50 (1991) ("[T]he general rule is that 'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective'"); *Passamaquoddy Tribe* v. *Maine*, 75 F.3d 784, 790 (1st Cir. 1996) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 2483 (1974)). *Accord Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 115 S. Ct. 2322, 2326 (1995).

16 MAP misconstrues the canon against the implicit repeal of legislation. It is generally true, as MAP argues, that the implicit repeal of legislation by implication is not favored. *See Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987). However, this canon is actually a variant of the general rule that "'[w]here there are two acts upon the same subject, effect should be

In all events, even if there were an inconsistency between the two sections, the later legislation -- here, Section 336 -- would control. "When two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislature's will."[17] Thus, even if Sections 336 and 399B were found to be in conflict, Section 336 would control. Congress recognized in enacting Section 336 the enormous opportunities for new and additional service made possible by digital transmission and directed the Commission to devise regulations that would enable DTV licensees to make those services available to the public. As shown fully in APTS/PBS' Comments on the Petitions for Reconsideration authorizing public television licensees to use their ancillary and supplementary DTV capacity for the purpose of supporting the noncommercial educational public television service is clearly in the public interest. *APTS/PBS Comments* at pp. 6-7. In light of that fact, Section 336 clearly authorizes the Commission to allow public television licensees to include advertiser-supported material in the ancillary and supplementary uses of DTV channels.

III. The Commission Should Use Channels 60 to 69 In Connection With The Transition to Digital Television Service

In its Comments, Motorola supports APTS/PBS's proposal to allow public television licensees assigned DTV channels outside the core spectrum flexibility with respect to constructing their DTV stations. However, it argues that allowing television licensees to

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given to both if possible'." *See United States* v. *Jordan*, 915 F.2d 622, 627, *cert. denied*, 499 U.S. 979 (1991) (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 352 (1936)). Here, MAP strains to find a conflict between Sections 336 and 399B; none exists.

17 *Boudette* v. *Barnette*, 923 F.2d 754, 757 (9th Cir. 1991). *See also Ionosphere Clubs*, 922 F.2d at 991 ("when two statutes are in irreconcilable conflict, we must give effect to the most recently enacted statute since it is the most recent indication of congressional intent") (citing *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 96 S. Ct. 1989, 1993 (1976)).

relinquish DTV allotments on channels 60 to 69 "could accelerate recovery of UHF-TV channels 60-69 for public safety and other wireless use." *Motorola Comments* at 5.

The APTS/PBS position should not be interpreted as supporting accelerated reallocation of channels 60 to 69 for nonbroadcast use. Rather, APTS/PBS have consistently argued[18] that all broadcast channels should be used during the transition to facilitate the Commission's goals of accommodating all existing broadcasters and replicating existing service. *Sixth Report and Order* at ¶1. APTS/PBS strongly supported the Broadcasters Caucus' position that the Commission make greater use of channels 60 to 69 to alleviate technical problems in the Table. Using channels 60 to 69 for DTV purposes would also facilitate the continued provision of service by television translators displaced by DTV stations. Channels 60 to 69 also provide a critical safety net if digital systems do not perform in the real world as predicted in the laboratory and field tests.

While APTS/PBS urged the Commission to assign public television stations DTV channels inside the core if further adjustments are made to the DTV Table, that proposal was based on the unique financial circumstances of public television and the importance of avoiding the expenses associated with building two DTV stations. It should not be construed in any way as supporting an early recovery of channels 60 to 69 or their reallocation for nonbroadcast use.

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18 *See, e.g., Comments of the Association of America's Public Television Stations and the Public Broadcasting Service* at pp. 12-19 (November 22, 1996).

Conclusion

For the reasons set forth above and in their earlier filings, APTS/PBS urge the Commission (a) to open a window promptly to allow U-to-U stations with limited power to seek improved facilities, provided no additional interference is created using the current interference criteria, (b) to reject MAP's arguments concerning advertiser-supported ancillary and supplementary DTV services, and (c) to preserve the FCC's option to use Channels 60 to 69 to the maximum extent feasible to preserve existing broadcast services, to facilitate an orderly transition to DTV, and to minimize any disruption of viewer expectations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Cynthia T. Miller, do hereby certify that on this 31st day of July, 1997, copies of the foregoing REPLY COMMENTS OF THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS AND THE PUBLIC BROADCASTING SERVICE were sent by first-class mail, postage prepaid to the following:

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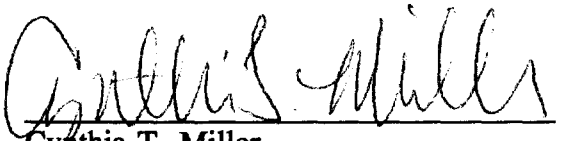

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